85-1830

Supreme Court, U.S.
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No. 85-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO III;
R. E. STOTELMYER, Major;
B. K. Smith, Counselor III;
K. R. Hileman, Farm Manager;
D. R. Erhard, Deputy Supt. for Treatment;
T. W. HENRY, Director of Treatment;
W. W. MATEER, C. I., Manager
Petitioners

v.

AARON HELMS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether respondent was a prevailing party, entitling him to an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, even though his release from prison rendered moot his prayers for declaratory and injunctive relief and petitioners were found to be immune from any award of damages.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO III;
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for Treatment;
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of Treatment;
W. W. MATEER, C. I., Manager

Petitioners

v.

AARON HELMS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioners, Lowell D. Hewitt, B.B. Kyler, R.E. Stotelmyer, B.K. Smith, K.R. Hileman, D.R. Erhard,

T.W. Henry, and W.W. Mateer, hereby petition that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit entered in this case on January 3, 1986.

OPINIONS BELOW

The opinion of the court of appeals of January 3, 1986 (Pet. App. 3a-25a) [1] is reported at 780 F.2d 367. The opinion of the district court of March 14, 1984 (Pet. App. 26a-39a) is not reported.

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[1] "Pet. App." refers to the appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was issued on January 3, 1986. This petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559, October 19, 1976, 90 Stat. 2641, as amended provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and Title "CIVIL RIGHTS," and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the

> State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in which the court held that respondent was a "prevailing party" within the meaning of Section 2 of The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L.94-559, October 19, 1976, 90 Stat. 2641, 42 U.S.C. § 1988, as amended (hereinafter, Section 1988). The district court had concluded that Helms had not prevailed because he had not received any of the relief he had sought. Pet. App. 36a-38a. The court of appeals reversed. Pet. App. 1a-2a.

This action began in the United States District Court for the Middle District of Pennsylvania on July 26, 1979. Helms filed it pursuant to 42

U.S.C. § 1983 on his own behalf and his behalf alone. At that time, Helms was in state prison; the defendants, petitioners in this Court, are state prison officials.

In this action, Helms challenged his detention in administrative custody pending completion of an investigation, his prison misconduct conviction, and his consequent confinement to restricted custody. He sought a declaratory judgment, an injunction to enjoin the prison officials from continuing him in restricted custody and to reverse and expunge his misconduct convictions, damages, costs, attorney's fees and "[s]uch other relief as may be necessary and proper."

On February 20, 1980, Helms was released from prison. On August 15, 1980, the district court, considering cross motions for summary judgment, entered judgment against Helms and in favor of the prison officials. The district court held that Helms' confinement in administrative custody implicated no interest protected by the Fourteenth Amendment (administrative custody issue); and that the institutional hearing committee's reliance on information obtained from a confidential informant to convict Helms of a prison misconduct was proper (informant's testimony issue).

The court of appeals reversed the judgment of the district court on both claims. Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981). The prison officials filed a petition for writ of

certiorari seeking review on the administrative custody issue only. The petition was granted. Hewitt v. Helms, 455 U.S. 999 (1982).

This Court agreed with the court of appeals' holding that the Pennsylvania regulations governing a prisoner's transfer to administrative custody created a protected liberty interest, but reversed the court of appeals' judgment on the ground that Helms had received all the process that was due to protect that interest. Hewitt v. Helms, 459 U.S. 460 (1983). On remand, the court of appeals vacated its previous judgment on the administrative custody issue and directed the district court to conduct further proceedings consistent with their original opinion on the informant's testimony issue. Helms v. Hewitt,

712 F.2d 48 (3d Cir. 1983).[2]

On remand to the district court, the parties filed cross motions for summary judgment. The only issue presented in the cross motions was whether the prison officials were entitled to immunity from damages. Helms did not request either declaratory or injunctive relief. The district court again entered judgment in favor of the prison officials and against Helms. Helms again appealed claiming that the district court had erred in determining

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[2]The original direction to the district court was: "Thus, on remand, if the defendants do not establish official immunity as discussed in Part IV infra, the district court should enter summary judgment for Helms on the issue whether he was denied due process in being confined in disciplinary custody." Helms, 655 F.2d at 502-503.

that the prison officials were entitled to immunity, and in failing to order the prison officials to expunge the misconduct charges based on the information supplied by a confidential informant. The court of appeals affirmed the district court's judgment without opinion. Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984) (mem.) [3]

In the meantime, after the district court had entered judgment but before that judgment was affirmed an appeal, the Pennsylvania Bureau of

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[3]In all appeals to the court of appeals the prison officials argued that the injunctive and declaratory relief requested in the complaint had been rendered moot by Helms' release from prison.

Corrections issued an amended regulation known as "Administrative Directive 801: Inmate Disciplinary Procedures." Effective May 1, 1984, the amended Administrative Directive 801 established, for the first time, procedures for the use of confidential source--i.e., informant--information in prison disciplinary proceedings. Pet. App. 10a.

Some months after the court of appeals had affirmed the district court, Helms filed an application for attorney's fees. Pet. App. 11a. As noted above, the district court denied the application. The district court found that Helms had lost his claim for damages, that his claim for injunctive relief had been mooted by his release

from prison, and that he had neither sought nor benefited from the change in procedure embodied in Administrative Directive 801. Pet. App. 34a-38a.

The court of appeals reversed, on the ground that its earlier holding--that Helms' due process rights were violated by the use of information supplied by a confidential informant as the sole basis of his conviction of a misconduct charge --was a form of "judicial relief" sufficient to make Helms a prevailing party. Pet. App. 17a-19a. Further, the court held that if Helms could prove that the amendment to Administrative Directive 801 had been caused by his litigation, he was entitled to be considered the prevailing party on this ground as well. Pet. App. 23a.

REASONS FOR GRANTING THE WRIT

I. WHETHER A PLAINTIFF WHO OBTAINS NO PERSONAL BENEFIT IS A PREVAILING PARTY FOR PURPOSES OF SECTION 1988 IS AN ISSUE OF GREAT IMPORTANCE WHICH HAS NOT BEEN RESOLVED BY THIS COURT.

Section 1988 provides in relevant part: "In any action or proceeding to enforce a provision of section[ ] 1983...of this title, [4]...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." In the instant case, the court of appeals found that a "declaration" Pet. App. 18a made in the course of an earlier appeal constituted "a form of judicial relief" sufficient to make Helms a "prevailing party" within the meaning of § 1988. Pet. App.

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[4]Title 42, United States Code.

18a-19a. Further, the court held that if on remand Helms could prove this action was the catalyst for a revision in the prison regulation he could assert prevailing party status on this basis as well, even though he received no benefit from that change. Pet. App. 23a. [5]

The issue thus presented is whether a plaintiff can be a prevailing party when he fails to obtain any personal benefit from his litigation. While the Act has been the subject of a

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[5]The court below explained that even though it had resolved the question of Helms' prevailing party status in his favor on grounds he had obtained judicial relief, the catalyst inquiry was necessary to address the extent of his success in accordance with Hensley v. Eckerhart, 461 U.S. 424 (1983). Pet. App. 20a

number of opinions of this Court, and even more frequent reviews by the lower federal courts, this issue has not been the subject of definitive opinion of this Court.[6]

In Hanrahan v. Hampton, 446 U.S. 754, 757 (1980), the Court held that Section 1988 "permit[s] such an . . . award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." In Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), (quoting from Nadeau v. Helgemoe, 581 F.2d 275, 278-79

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[6]For example, in Kentucky v. Graham, No. 84-849, (June 28, 1985) slip op. at 5 n.9 the Court observed: "We express no view as to the nature or degree of success necessary to make a plaintiff a prevailing party. See Maher v. Gagne, 448 U.S. 122 (1980)."

(1st Cir. 1978)), the Court found that an appropriate "typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Therefore, while the term "prevailing party" has been defined as requiring a showing by plaintiff of "his entitlement to some relief" and achievement of "some of the benefits the parties sought," the question whether the relief obtained or the benefits sought actually inure to plaintiff has not been adequately resolved.

Left undisturbed, the holding by the court below promotes pursuit of issues in which the parties have lost

their concrete adversarial relationship. The opinion of the court of appeals appears to treat differently applications for attorney's fees depending on whether defendant's immunity defense is considered by the district court before the first appeal rather than after remand.[7] If the district court had considered the prison officials' assertion that they were entitled to immunity and had granted judgment on the damages claim on this ground as well, there can be no doubt that Helms was not a prevailing party. To consider Helms to have prevailed merely because he succeeded in obtaining

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[7]Helms' declaratory and injunctive prayer were moot before the district court's first opinion granting the prison official's summary judgment.

a remand which only resulted in the same conclusion is anomalous. As observed by this Court, "...Congress sought to avoid making § 1988 a '"relief fund for lawyers."' Kentucky v. Graham No 84-849 (June 28, 1985) slip op. at 8-9 (citations omitted).

The court of appeals would also permit Helms to qualify for fees regardless of when the prison officials changed the regulation so long as he could show that his litigation somehow affected that change. In the instant case, the prison regulations were modified to provide a process for assessing the credibility and reliability of informant's testimony while the action was pending in the court of appeals on an appeal from the grant of judgment in favor of the prison officials based on their immunity. That modification had no

possible impact on either Helms or his lawsuit since he was no longer in prison.[8] The catalyst analysis should not be broadened to permit a plaintiff to succeed for attorney's fees when the change in regulations did not moot the injunctive prayer since it was already moot and when he obtains no personal benefit.

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[8]Helms appealed the district court's award of judgment in favor of the prison officials, inter alia, on the ground that the district court should have enjoined the prison oficials to expunge Helms' dormant prison records. The prison officials argued both that Helms had abandoned his prayer for injunctive relief by failure to pursue it in his summary judgment motion and that, in any case, all injunctive prayers had been rendered moot. The court of appeals affirmed the district court's judgment without opinion. Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984) (mem.)

It is unthinkable that attorney's fees applications can achieve viability independent of the original cause of action. The opinion of the court below would permit, in effect, a separate action for fees based on conduct of former litigants taken long after the original litigation had ended. The spectre of fee awards in such cases in which no injunction was issued may have the effect of impeding the implementation of changes in government policies rather than promoting them. "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." Kentucky v. Graham, No 84-

849, (June 28, 1985) Slip Op. at 5 (citation and footnote omitted). While Graham examines the question of awarding attorney's fees from the opposite direction--i.e., who has been prevailed against rather than who succeeded in prevailing--it is instructive on the inexorable link which must exist between the success on the merits and the success on an application for fees. The Court should accept review of this case because the decision of the Court of appeals effectively negates the requirement that the plaintiff must obtain some relief to be entitled to fees.

II. THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 42 U.S.C. § 1988

As noted above, the full contours of the term "prevailing party", left undefined by the Act, have not been fixed. The court of appeals found that its prior statement on the law, which the prison officials submit could not confer actual benefit on Helms as he was no longer in prison and did not result in an award of damages, constituted judicial relief and permitted Helms to prevail for fees. The court of appeals also found that Helms could attain prevailing party status for fees if he could prove his litigation was the catalyst for the modification in prison regulations which occurred after his release from prison. As we discuss

below, there is a conflict among the circuits on how and when a plaintiff may be considered prevailing. This issue should be resolved by this Court.

a. The Decision Below That A Statement On The Law Contained In The First Opinion Of The Court Of Appeals Constituted Judicial Relief Conferring Prevailing Party Status On A Plaintiff Conflicts With Decisions Of Other Courts Of Appeals.

After observing that the prison officials had argued that Helms had obtained no damages because they enjoyed qualified immunity and that Helms' release from prison had rendered moot his prayers for declaratory and injunctive relief, the court of appeals stated:

We reject the [prison officials'] contention that [Helms] failed to obtain judicial relief. In Helms I [Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981)] we declared that [Helms'] due process rights were violated by the prison officials' unconstitutional use the hearsay report....Our declaration acts as an important vindication of [Helms] rights. Accord Fast v. School District of City of Ladue, 728 F.2d 1030, 1033 (8th Cir. 1984) (en banc). The declaration is a form of judicial relief which serves to affirm [Helms'] assertion that the [prison officials'] actions were unconstitutional and which will serve as a standard of conduct to guide prison officials in the future. We find that, on the facts before us, [Helms] did actually obtain judicial relief of the same general type as that requested....Section 1988 does not require that [Helms] secure for-

> mal relief or monetary damages to be considered a prevailing party.

(App. 17a-19a) (citations omitted).[9] It is apparent that the court below did not address the prison officials' contention that equitable relief had been rendered moot and, therefore, a declaration in the formal judicial sense

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[9]In point of fact, the court's reliance upon Fast is misplaced. In Fast, the district court awarded plaintiff, a tenured teacher, an injunction requiring defendants to provide the teacher with a post- termination hearing. The teacher elected to waive her right to a hearing and moved for an award of nominal damages and attorney's fees. The fact that she elected not to go through with the hearing is of no moment, because none of the relief for which she prayed became moot during the course of the proceeding. There can be no doubt that she obtained a personal benefit.

was unavailable. It can only be assumed that the court below concluded that a resolution of the mootness issue was not material to determining Helms' right to fees. To the contrary, the fact Helms could not obtain a declaratory judgment is material and failure to address this fact conflicts with opinions of other courts of appeals.

In Tucker v. Summer, C.A. No. 85-3355 (5th Cir. March 10, 1986) the court rejected a claim for fees based on plaintiff attaining a preliminary injunction that required defendants to permit plaintiff to sit for the state bar exam. In considering an appeal injunction from a denial of attorney's fees the court of appeals concluded it had lacked subject matter jurisdiction

to enter the from the outset. In order to grant plaintiff a preliminary injunction in the first instance the court had to have concluded that her probability of success on the merits was high. The fact this was not discussed in denying fees leads to the conclusion that the Fifth Circuit believed that whatever conclusion it reached concerning constitutional law was not material to resolving plaintiff's claim for fees when plaintiff was ultimately unsuccessful in obtaining the relief she sought.

Similarly, in Ward v. County of San Diego, C.A. No. 84-6362 (9th Cir., March 3, 1986), the Ninth Circuit expressly rejected plaintiff's contention that a preliminary injunction entered by the district court, but vacated by the court of appeals because

plaintiff lacked standing, conferred prevailing status on her because it contained a statement of constitutional violation.

There should be no doubt that the court below in Helms lacked jurisdiction to enter a judgment in favor of Helms. As is noted in the Statement above, Helms had been released from prison before the first opinion by the court of appeals [10] The existence of an "'actual controversy' [is] a requirement imposed by Article III of the Constitution and the express terms

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[10]Helms was released on February 20, 1980; the court of appeals entered its order reversing the district court on June 30, 1981. Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981).

of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201." Steffel v. Thompson, 415 U.S. 452, 458 (1974) (footnote omitted). See Bender v. Williamsport Area School District, No. 84-773 (March 25, 1986). There must be extant at all times prior to final judicial review "a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). Even assuming Helms had standing to seek a declaratory judgment prior to his release, his parole from prison rendered moot his declaratory prayer. Allen v. Likins, 517 F.2d 532 (8th Cir. 1975).

Therefore whatever the import of the court of appeals' statement, it did not constitute a valid declaratory judgment.

In Harrington v. Vandalia - Butler Bd. of Ed., 585 F.2d 192, 197 (6th Cir. 1978), cert. denied, 441 U.S. 932 (1979), a case considering an application for attorney's fees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) [12] The court noted:

> It is true, of course, that the plaintiff succeeded in obtaining a judicial determination that the defendant Board discriminated against her in the conditions of her employment. This determina-

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[12] Although the Title VII attorney's fees provision and § 1988 are separate and distinct statutory bases for awards of attorney's fees, both employ the "prevailing party" concept and they have received similar construction. Hensley v. Eckerhart, 461 U.S. 424, 433 n 7. (1983); Hughes v. Rowe, 449 U.S. 5, 14 (1980).

> tion, standing alone, does not in our judgment suffice to constitute her as a prevailing party within the meaning fo the Act."

Because the court of appeals lacked jurisdiction to enter a declaratory judgment, its declaration of law in the process of considering a claim for damages which the plaintiff lost conferred no benefit on Helms. Thus, its opinion on prevailing party status is in conflict with the Court of Appeals for the Fifth, Sixth and Ninth Circuits.

b. The Finding That A Plaintiff Is The Prevailing Party If The Change In Prison Regulations Was Caused By His Litigation, Even Though He Will Not Personally Benefit From The Change, Is In Conflict With The Opinions Of Other Courts Of Appeals.

The district court did not conduct a hearing to determine if Helms was the catalyst for an addition to prison regulations which occurred more than four years after Helms' release from prison[13] and after the last opinion on the merits by the district determination was made without court.

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[13]Helms was paroled from prison on February 20, 1980. The regulation detailing the procedures to be followed when using confidential source information was effective May 1, 1984. (App. 10a)

The basis for the district court's denial of fees was that Helms had not prevailed in fact. This conducting a hearing because plaintiff could not have benefited by the change in regulation relating to hearings for prisoners when he was no longer a prisoner and because, in any case, he had not sought that relief. The court of appeals ignored the fact that Helms could not have received the benefit of any change, stating "[s]ection 1988 is designed to provide an incentive to the ordinary citizen to enforce the Constitution whenever it is violated so that the rights of all similarly-situated persons will be better protected". Pet. App. 22a In conclusion, it observed that "[i]f [Helms] can establish causation between his suit and 'some of the benefit sought,' he is a prevailing

party on this issue for purposes of section 1988. We find sufficient evidence of causation to warrant a hearing before the district court." Pet. App. 23a. (citation omitted). This holding, which necessarily implies that whether Helms benefits from the change is immaterial to deciding prevailing party status, is in conflict in principle with other courts of appeals.

In each opinion from another court of appeals in which the catalyst analysis has been employed, the fact that the plaintiff was a recipient of the benefit is clear. For example, in Dover v. Rose, 709 F.2d 436, 439 (6th Cir, 1983) the court stated: "In order to be a prevailing party for purposes of section 1988, a plaintiff must establish his entitlement to some form of relief

on the merits of a substantial claim." (citations omitted) (emphasis supplied). In Doe v. Busbee, 684 F.2d 1375, 1379 (11th Cir. 1982), the court observed: "[a] party may be considered to be 'prevailing' if the litigation successfully terminates by consent decree, an out-of-court settlement, a voluntary cessation of the unlawful practice by defendant, or other mooting of the case where the plaintiff has vindicated his right." (emphasis added). In Othen v. Ann Arbor School Bd., 699 F.2d 309, 313 (6th Cir. 1983), the court stated: "[w]e do not believe the plaintiff [a father who brought the action as next friend of his two daughters] can be considered the prevailing party' in this action. He asked for no specific relief for his daughter . . . . [h]e withdrew his request for

all relief on the basis of assurances that there would be a golf team...which his younger daughter would have the opportunity to try out for."

The application of the catalyst analysis in the instant case conflicts with these other cases in two respects. First, the change in regulation did not moot that aspect of the action as it was already moot. Second, Helms has been permitted to prevail for fees without a change in the prison officials' regulation having benefited him.

CONCLUSION

The petition for a writ of certiorari should be granted and upon review the judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 85-5254
AARON HELMS, Appellant
vs.
LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO III;
R. E. STOTELMYER, Major;
B. K. Smith, Counselor III;
K. R. Hileman, Farm Manager;
D. R. Erhard, Deputy Supt.
for Treatment;
T. W. HENRY, Director
of Treatment;
W. W. MATEER, C. I., Manager
(D. C. Civil No. 79-0950)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

Present: HIGGINBOTHAM, SLOVITER and
MANSMANN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel November 18, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court, entered March 14, 1985 be, and the same is hereby reversed and the cause remanded to the said District Court with direction to conduct a hearing on plaintiff's catalyst argument and for calculation of the fee award. Costs taxed against the appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

s/Sally Mrvos

Clerk

January 3, 1986

Certified as a true copy and issued in lieu of a formal mandate on January 27, 1986.

Test: s/M. Elizabeth Ferguson Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.
UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 85-5254

AARON HELMS

vs.

LOWELL D. HEWITT, Supt.;
B.B. Kyler, CO III;
R.E. STOTELMYER, Major;
B.K. SMITH, Counselor III;
K.R. HILEMAN, Farm Manager;
D.R. ERHARD, Deputy Supt.
for Treatment;
T.W. HENRY, Director of Treatment;
W.W. MATEER, C.I., Manager

Aaron Helms,

Appellant

Appeal from the United States
District Court for the Middle District
of Pennsylvania

(D.C. No. 79-0950)

Argued November 18, 1985

Before: HIGGINBOTHAM, SLOVITER and
MANSMANN, Circuit Judges

(Filed January 3, 1986)

Robert H. Vesely, Esq. (Argued)
John M. Humphrey, Esq.
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ATTORNEY FOR APPELLEE

OPINION OF THE COURT

MANSMANN, Circuit Judge.

This appeal arises from the district court's denial of plaintiff's petition for attorney's fees filed pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, as amended, 42 U.S.C. § 1988 (1981), after the entry of summary judgment in favor of the defendants. The underlying action involved the plaintiff's claim that his Four-

teenth Amendment due process rights were violated by the defendants' actions when he was confined to administrative segregation. The district court denied the plaintiff's fee application because it found that the plaintiff was not a prevailing party for purposes of section 1988. We reverse and remand to the district court for a hearing and computation of the amount of a fee award.

I.

The plaintiff filed this action under 42 U.S.C. § 1983 against officials of the State Correctional Institution at Huntingdon, Pennsylvania. In his complaint, the plaintiff protested his confinement in administrative segregation by the defendants after they alleged that he assaulted a prison employee and participated in a riot. The plain-

tiff expounded three theories by which his due process rights as guaranteed by the Fourteenth Amendment were violated by that confinement. Helms v. Hewitt, 655 F.2d 487, 491-92 (3d Cir. 1981) ("Helms I") (subsequent history omitted). First, Helms claimed that Pennsylvania Bureau of Corrections' regulations governing administrative segregation established the process due under the Fourteenth Amendment and that the failure to accord him that process violated his constitutional rights. Second, the plaintiff asserted that the state's prison regulations created a liberty interest of which he could be deprived only by constitutionally mandated due process. Third, Helms argued that a finding of guilt resting on a hearsay account of uncorroborated information from a single unidentified

informant contravenes principles of fundamental fairness implicit in the Due Process Clause.

The plaintiff requested the entry of declaratory judgment, "declaring plaintiff's rights under the Fourteenth Amendment and 42 U.S.C. § 1983 violated as more specifically set forth in this Complaint." The plaintiff also prayed for the entry of a permanent injunction, a reversal of his disciplinary conviction, monetary relief and "such other relief as may be necessary and proper."

After discovery was closed, the district court granted the defendants' motions for summary judgment. The plaintiff appealed that decision, and we reversed. Helms I, 655 F.2d 487 (3d Cir. 1981). We found that the state regulations had created an expectancy or

entitlement which rose to the level of a protected liberty interest. We held that "Helms was denied due process unless he was afforded a hearing, within a reasonable time of his initial confinement, to determine whether he represented the type of 'risk' warranting administrative detention." Id. at 500. We also concluded that "Helms suffered a denial of due process by being convicted on a misconduct charge when the only evidence offered against him was an uncorroborated report of an unidentified informant." Id. at 502. The case was remanded to the district court to determine whether Helms had been afforded a hearing satisfying the requirements of due process and to decide whether the defendants were entitled to qualified immunity with

respect to the unconstitutional use of the hearsay report.

The United States Supreme Court granted the defendants' petition for writ of certiorari and reversed. Hewitt v. Helms, 459 U.S. 460 (1983). The Supreme Court agreed that the state regulations created a constitutionally protected liberty interest. The Court held, however, that the plaintiff had been afforded sufficient due process after being confined to administrative segregation. The Supreme Court was not asked to review our finding that the defendants' use of the hearsay report violated the Constitution.

Following the Supreme Court's decision, we remanded the case to the district court for resolution of the question of qualified immunity on the

hearsay issue. Helms v. Hewitt, 712 F.2d 48, 49 (3d Cir. 1983) ("Helms II"). The district court subsequently found that the defendants were entitled to qualified immunity and entered judgment against the plaintiff. We affirmed without opinion. Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984) (aff'ing mem.) ("Helms III").

During the course of this litigation the Bureau of Corrections of the Commonwealth of Pennsylvania issued Administrative Directive 801: Inmate Disciplinary Procedures. This directive, effective May 1, 1984, detailed for the first time the procedures to be followed with respect to the use of confidential source information.

On December 7, 1984, the plaintiff filed the petition for attorney's fees which is the subject of this appeal. The district court denied that petition.

II

The Civil Rights Attorney's Fees Awards Act of 1976 provides that "[i]n any action or proceeding to enforce a provision of [section 1983]. . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1981). Congress enacted section 1988 because it believed that fee awards are essential to the private enforcement of the civil rights laws.

> If private citizens are to be able to assert their civil rights, and if those who violate the

> Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S.Rep. No. 94-1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910. "In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." Id. at 3, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910-11.

In decisions interpreting section 1988, we have articulated two requirements for prevailing party status warranting an award of attorney's fees:

> [T]he plaintiffs must essentially succeed in obtaining some relief on the merits of their claim, and the circumstances under which the

> plaintiffs obtain that relief must be causally linked to the prosecution of the complaint.

N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161, 1171 (3d Cir. 1982) (citations and footnote omitted), cert. denied, 460 U.S. 1052 (1983); see also Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 910-11 (3d Cir. 1985) (reaffirming standard in light of Hensley v. Eckerhart, 461 U.S. 424 (1983)).

The plaintiff argues that he should be afforded prevailing party status because he obtained "some relief" on his claim that the use of the hearsay report of an unidentified informant to support administrative segregation violated due process. The plaintiff claims he obtained relief from the judicial holdings in this litigation

and, in addition, from the promulgation of Administrative Directive 801. The district court found no merit in either alleged source of relief. The court reasoned:

> In this case, while the court found a constitutional violation, the defendants were held to be immune from liability for compensatory damages. Plaintiff's requests for injunctive relief were moot since plaintiff was no longer in prison to receive the benefits of his requested relief. Thus, while the plaintiff may claim a moral victory by the issuance of Administrative Directive 801, he has failed to prove that he was entitled to relief.

The district court, having found that the plaintiff had not succeeded in obtaining some relief on the merits of his claim, rejected the fee petition.

We review that determination for legal error. Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102 (3d Cir. 1981).

III.

The plaintiff first challenges the district court's finding that the plaintiff failed to achieve some relief on the merits of his claim in the course of this litigation. The plaintiff asserts that our holding in Helms I, declaring that the plaintiff's rights were violated by the defendants' unconstitutional use of the hearsay report, was the source of some relief on the merits of his claim. Consequently, the plaintiff argues, he is a prevailing party for purposes of section 1988.

The first step in applying the prevailing party standard is "to identify the relief plaintiff sought and, in the relevant cases, the legal theories on which the relief was based." Institutionalized Juveniles, 758 F.2d at 911. The district court should compare the relief sought with the relief actually obtained, not with the success of the legal theories. The entry of judgment in the plaintiff's favor is not essential for prevailing party status. A plaintiff, for example, may be a prevailing party where extra-judicial relief makes the legal claims moot. Id. A plaintiff may also be a prevailing party where he is awarded relief which he previously asserted was inadequate or where the relief obtained

is not identical to the relief specifically demanded, so long as the relief obtained is of the same general type. Id. at 912. In the instant case, the plaintiff sought broad relief. In addition to demands for monetary and injunctive relief, the plaintiff sought a declaratory judgment announcing that the defendants had violated his constitutional rights. The plaintiff also requested "such other relief as may be necessary and proper." We note that the district court is empowered to award the plaintiff all relief to which he is entitled, including relief not demanded in his pleadings. Fed.R.Civ.P.54(c).

Having outlined the relief sought by the plaintiff, we turn to the identification of what judicial relief the plaintiff actually obtained. The defendants argue that the plaintiff obtained no judicial relief. The defen

dants indicate that, as a result of the district court's qualified immunity finding, the plaintiff was not entitled to monetary damages. The defendants also maintain that plaintiff's other requests for relief were rendered moot by his release from prison.

We reject the defendants' contention that plaintiff failed to obtain judicial relief. In Helms I, we declared that plaintiff's due process rights were violated by the prison officials' unconstitutional use of the hearsay report. We held:

> [A] prisoner is denied due process when his conviction on disciplinary charges rests solely on a hearsay report of an unidentified informant's account which offers no basis for an independent assessment of the informant's credibility or reliability.

Helms I, 655 F.2d at 503. Our declaration acts as an important vindication of the plaintiff's rights. Accord Fast v. School District of City of Ladue, 728 F.2d 1030, 1033 (3th Cir. 1984) (en banc). The declaration is a form of judicial relief which serves to affirm the plaintiff's assertion that the defendants' actions were unconstitutional and which will serve as a standard of conduct to guide prison officials in the future.

We find that, on the facts before us, the plaintiff did actually obtain judicial relief of the same general type as that requested in his complaint. The plaintiff successfully served as a "private attorney general" to enforce the Constitution where he suspected a violation of his rights.

Section 1988 does not require that he secure formal relief or monetary damages to be considered a prevailing party. N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d at 1167. The Congressional purpose in enacting section 1988 is served where a plaintiff who successfully acts as a "private attorney general" is permitted to recover attorney's fees. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910.

We find that the district court erred in failing to award attorney's fees for professional services relating to this issue. We will remand to the district court for computation of the amount of the attorney's fees award.

IV.

Second, we consider the plaintiff's contention that he is a prevailing party entitled to an award of attorney's fees because his suit acted as a catalyst for the promulgation of the revisions of Administrative Directive 801. We reach this issue despite our finding of prevailing party status above because one factor in the computation of the amount of the fee award is the extent of relief actually obtained by the prevailing party. Hensley v. Eckerhart, 461 U.S. 424 (1983). The revisions of Administrative Directive 801 addressed the use of hearsay reports based on information from confidential informants in prison disciplinary proceedings. The district court dismissed the plaintiff's catalyst argument, finding that he had

not sought "relief in the form of corrective procedures by the Bureau of Corrections in the use of undisclosed informants." We reject the court's reasoning.

We have said that, for purposes of a section 1988 petition:

> Any success achieved by plaintiff need not be achieved in a formal manner; a plaintiff is considered the prevailing party if his "lawsuit acted as a catalyst which prompted [the defendant] to take action" to correct the unlawful practice.

N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d at 1167 (citation omitted). We note that the plaintiff specifically requested a change in the defendants' practice so far as it was applied to him. Since we can assume that the state and its agents would act in good faith to comply with the law, it must be said that plaintiff's complaint contem-

plated a modification in the treatment of all prisoners subject to disciplinary actions based on information obtained from confidential informants. Section 1988 is designed to provide an incentive to the ordinary citizen to enforce the Constitution whenever it is violated so that the rights of all similarly-situated persons will be better protected. It is not a prerequisite to an award of attorney's fees under section 1988 that the plaintiff request sweeping changes in the defendants' practices and procedures. The district court erred as a matter of law in finding that the plaintiff's catalyst argument was not entitled to consideration because the plaintiff had failed to request relief of the same general type as that obtained in the revised regulation.

While the effect of the plaintiff's suit on the revised regulations may fulfill the requirements of section 1988, it is beyond the function of a reviewing court to make such a determination. On remand, the district court must determine whether the plaintiff's suit caused or was a catalyst for the revision of Administrative Directive 801. If plaintiff can establish causation between his suit and "some of the benefit sought," he is a prevailing party on this issue for purposes of section 1988. Id. at 1167. We find sufficient evidence of causation to warrant a hearing before the district court. The timing of the promulgation of the revised regulations in relation to the courts of this suit is sufficient to suggest that the district court should review carefully the causation

issue. We will remand this case to the district court for an appropriate hearing.

V.

We find that the district court erred in holding that plaintiff was not entitled to an award of attorney's fees pursuant to 42 U.S.C. § 1988 on the basis of the relief obtained in the course of the litigation. We also find that the district court erred in failing to conduct further fact finding on the plaintiff's argument that his suit acted as a catalyst for the promulgation of the revisions of Administrative Directive 801. Consequently, we will reverse the district court's order of March 14, 1985 and will remand the case

to the district court fo a hearing on the plaintiff's catalyst argument and for calculation of the fee award.

A True Copy:

Teste:

Clerk of the United States Court
Of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AARON HELMS, Plaintiff	:	
v.	:	Civil Action No. 79-0950
LOWELL D. HEWITT, et al., Defendants	:	

MEMORANDUM

This action was commenced on July 26, 1979. On August 15, 1980, ruling on cross-motions for summary judgment, this court denied plaintiff's motion and entered judgment for defendants. On June 30, 1981, the Court of Appeals for the Third Circuit reversed the judgment and taxed costs in favor of plaintiff. Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981). The defendants petitioned for writ of certiorari on the issue of what process was due for admini-

strative confinement prehearing. The petition was granted by the Supreme Court on March 8, 1982, Hewitt v. Helms, 455 U.S. 999 (1982) and on February 22, 1983 the Supreme Court reversed the judgment of the Court of Appeals. Hewitt v. Helms, 459 U.S. 460 (1983). On June 29, 1983, the matter was remanded by the Court of Appeals to this court for further proceedings on the issue of whether defendants acted reasonably in light of existing law when finding plaintiff guilty based on evidence provided by an unidentified informant. Helms v. Hewitt, 712 F.2d 48 (3d Cir. 1983). Both plaintiff and defendants filed motions on the remaining issue of qualified immunity and on February 3, 1984 the court denied plaintiff's motion and ruled in favor of the

defendants. A second appeal to the Circuit Court followed. Both parties challenged this court's judgment. This court's judgment was affirmed on August 21, 1984.

Plaintiff's counsel has now filed an application for attorney's fees. The matter has been briefed and is ripe for decision.

In the instant case, plaintiff brought suit complaining in part that his constitutional right to due process had been violated by his conviction on disciplinary charges based upon an unverified and unsubstantiated account of an unidentified informant. On this issue the Court of Appeals for the Third Circuit held

> [T]hat a prisoner is denied due process when his conviction on disciplinary charges rests solely on the

> hearsay report of an unidentified informant's account which offers no basis for an independent assessment of the informant's credibility or reliability.

Helms v. Hewitt, 655 F.2d 487 at 503 (3d Cir. 1981). Plaintiff's claim for damages on this issue was ultimately dismissed based on official immunity. This judgment was affirmed on August 21, 1984.

In addition to damages, plaintiff sought injunctive relief in the form of expungement of his disciplinary conviction from his records and return to the custody status he enjoyed prior to December 3, 1978. Petitioner did not receive any injunctive relief.

Effective May 1, 1984, the Bureau of Corrections of the Commonwealth of Pennsylvania issued Administrative Directive 801: Inmate Disciplinary Procedures. This directive detailed the procedures to be followed with respect to the use of confidential source information. No relevant regulations with respect to confidential source information existed previously.

Plaintiff argues that he is a prevailing party as a result of (1) the Third Circuit opinion on the confidential informant issue, even though his damage claim was not allowed based on official immunity; and (2) the subsequent issuance of Administrative Directive 801.

Defendants argue that plaintiff is not a prevailing party. They contend that he received none of the relief

requested in his Complaint. With respect to the Administrative Directive, defendants point out that plaintiff never sought as relief a change in policy nor did the change benefit the plaintiff who has not been in the state system since the change occurred.

Defendants also argue that the petition for fees is untimely pursuant to Local Rule 804.2, which states in pertinent part

> Bills of costs, unless an extension is granted, shall be filed no later than 30 days after entry of final judgment.

This petition was filed three and one-half months after the Court of Appeals affirmed this court's decision.

The Court in Brown v. City of Palmetto, Ga., 681 F.2d 1325, 1326 (11th Cir. 1982) held as follows:

Contrary to general rule, 42 U.S.C. § 1988 allows attorney's fees in 1983 actions to be treated as part of the costs of litigation. Rule 54(d) of the Federal Rules of Civil Procedure, which provides for the awarding of costs, does not limit the period of time in which a motion for costs may be made. Consequently, there is no jurisdictional time limit on the filing of a motion for attorney's fees under section 1988. Brown contends however, that defendants' delay of four months before filing their motion for attorney's fees violated a local court rule requiring bills of cost to be filed within thirty days after the time judgment is entered. District courts may adopt local rules establishing timeliness standards for the filing of claims for attorney's fees. Such local rules may provide that such claims must be included in and filed within the time allowed

> for motions for other costs. There are, however, significant distinctions between attorney's fees and other costs. Inclusion of a claim for attorney's fees within the time constraints applicable to requests for other costs should be by explicit provision of the local rules. Absent violation of a local rule a claim for attorney's fees would be untimely only on a showing of unfair surprise or prejudice. There is nothing in the local rule under consideration to indicate that it was intended to include claims for attorney's fees under 42 U.S.C. § 1988. Additionally, Brown failed to make any showing of unfair prejudice or surprise. Consequently, we find that defendants' motion for an award of attorney's fees was timely filed. (Citations omitted)

In Inmates of Allegheny County Jail v. Pierce, 716 F.2d 177, 179 (3d Cir. 1983), the court held that absent a

> local rule establishing a time limit, the timeliness of an application for attorney's fee is a matter for the district court's discretion. An application should be denied as untimely if the lateness of its filing causes unfair surprise or prejudice to the defendant. (Citations omitted)

Defendants have asserted no unfair surprise or prejudice. The court will deem the application as timely filed.

In order to recover attorney's fee awards under 42 U.S.C. § 1988, the court must determine whether the plaintiff in this action is a prevailing party. N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161 (3d Cir. 1982). In order to be a prevailing party for purposes of section 1988, a plaintiff must establish his entitlement to some form of relief on the merits of a substantial claim, Dover v. Rose, 709

F.2d 436 (6th Cir. 1983). Some circuits have held that a plaintiff may qualify as a prevailing party if his lawsuit acts as a "catalyst" which causes the defendant to make significant changes in its past practices, although no direct relief is granted. Othen v. Ann Arbor School Board, 699 F.2d 309, 313 (6th Cir. 1983). The catalyst argument, however, cannot be overly broad. The standard used in this circuit for determining prevailing party status is whether the plaintiff achieved "some of the benefit sought by bringing the suit." N.A.A.C.P., supra at 1167, 1169.

In Othen, supra at 313, the Sixth Circuit held that plaintiff was not entitled to fees because he obtained none of the relief sued for. However, the court in N.A.A.C.P., supra stated

> The issue is not whether plaintiffs obtained the form or extent of relief they originally requested but whether the substance of the litigation's outcome...provided much of the relief appellants had initially sought.

N.A.A.C.P., supra, p. 1169.

As stated in Othen, supra at 314, if the requesting party has not prevailed in fact, that is the end of the matter. In this case, while the court found a constitutional violation, the defendants were held to be immune from liability for compensatory damages. Plaintiff's requests for injunctive relief were moot since plaintiff was no longer in prison to receive the benefits of his requested relief. Thus, while the plaintiff may claim a moral victory by the issuance of

Administrative Directive 801, he has failed to prove that he was entitled to relief. Dover v. Rose, 709 F.2d 436, 439 (6th Cir. 1983).

In Ross v. Horn, 598 F.2d 1312, 1322 (3d Cir. 1979), Judge Higginbotham, speaking for the court, held that if new procedures, which provided much of the relief appellants had initially sought, were implemented as a result of the lawsuit, the appellants were prevailing parties with respect to a protion of their claims (which claims were thereby effectively mooted) irrespective of the judgment entered against them. In the instant case, however, plaintiff did not seek any relief which became mooted during the controversy; nor did he seek relief in the form of corrective procedures by the Bureau of Corrections in the use of undisclosed informants.

For the foregoing reasons, plaintiff is not deemed to be a prevailing party and thus, is not entitled to attorney's fees.

Sylvia H. Rambo
United States District Judge

DATED: March 14, 1985

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AARON HELMS, Plaintiff	:	
v.	:	Civil Action No. 79-0950
LOWELL D. HEWITT, et al., Defendants	:	

ORDER

For the reasons stated in the accompanying memorandum, IT IS HEREBY ORDERED THAT plaintiff's Petition for Attorney's Fees is denied.

Sylvia H. Rambo
United States District Judge

DATED: March 14, 1985